Supreme Court, U.S.
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No. 02-269

In The

Supreme Court of the United States

RACHEL PEREZ,

Petitioner,

v.

MIAMI-DADE COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

Whether the Court should review the Eleventh Circuit's unpublished per curiam affirmance of an unpublished district court's final summary judgment disposing of Petitioner's claim of retaliation under Title VII of the Civil Rights Act where the record does not support many of the assertions in the Petition and where the standard applied by the district court was in accord with the law of the Eleventh Circuit and the majority of the other circuits and where the purportedly conflicting law cited by Petitioner would yield the same result in this case as the Eleventh Circuit's per curiam affirmance.

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RESTATEMENT OF THE CASE AND FACTS

The Court of Appeals for the Eleventh Circuit in an unpublished opinion affirmed, per curiam, the district court's final summary judgment dismissing the Petitioner's claim of retaliation under Title VII[1] of the Civil Rights Act.[2]

The Court of Appeals determined that the district court was correct in concluding that none of the alleged actions during the limitations period were adverse employment actions in retaliation for Petitioner's 1995 complaint of discrimination and that much of the alleged actions were undermined by the record and Petitioner's own testimony. The Court of Appeals also held that the actions Petitioner complained of failed to meet the threshold level of substantiality required by the Eleventh Circuit.

The facts relied on by the district court and the Court of Appeals were derived almost entirely from facts stipulated in the Pretrial Stipulation and the deposition testimony of the Petitioner.

Respondent Miami-Dade County ("the County") is a political subdivision of the State of Florida. The Miami-Dade County Police Department ("MDPD") is a department of Miami-Dade County. The County has an established policy prohibiting discrimination on the basis of sex,

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[1] 42 U.S.C. §§2000e et seq.

[2] The district court also granted summary judgment on Petitioner's disparate treatment claim on the basis of gender, but Petitioner did not appeal the summary judgment on that ground to the Court of Appeals.

prohibiting retaliation, and prohibiting sexual harassment. The County also has several avenues for an employee to complain of discrimination, harassment and retaliation.

At the time of the district court's decision, the Petitioner was a sworn police officer with the County in the Miami-Dade Police Department and had been continuously employed by the County since she was hired as a police officer trainee in 1992. In 1993, Petitioner became a sworn probationary police officer assigned to MDPD's Northside District police station (hereafter "Northside"). Petitioner received training on the policy against sexual harassment and discrimination and was aware of MDPD's policy against discrimination as early as 1994 and was aware that for purposes of discrimination she could have gone to her supervisor, to the Professional Compliance Bureau and she could have gone to the EEOC.

During 1994, Petitioner became certified as a swim instructor as a result of training provided by MDPD. On occasion, instead of reporting to Northside for routine patrol work, Petitioner would serve as a swim instructor for police trainees at MDPD's Training Bureau. Petitioner had no complaints during her tenure at Northside about her opportunities to serve as a swim instructor at MDPD's Training Bureau.

On or about July 19, 1995 [while employed at Northside], Petitioner complained to MDPD's Professional Compliance Bureau ("PCB") (previously known as Internal Affairs) about a sexual remark made by another officer and other matters. This internal complaint is not the subject of this case but is the only protected activity cited by the Petitioner's EEOC Charge.

After the July 1995, complaint to PCB, Petitioner requested to be transferred to the Intracoastal District police station. MDPD granted Petitioner's request to transfer to the Intracoastal District police station and in September 1995 Petitioner was transferred to the Intracoastal District police station.

From the time Petitioner lodged her internal complaint of discrimination in July 1995 through the end of 1995, the Pretrial Stipulation and Petitioner's deposition show the following undisputed facts: (1) Petitioner's request to transfer to Intracoastal District station was granted, (2) Petitioner was permitted to teach swimming at the pool for one week in September 1995 instead of reporting to road patrol, (3) Petitioner's first supervisor,[3] Sgt. Amabile, wrote "Welcome to the squad" on her first monthly report,[4] (4) Petitioner received a commendation in October 1995, (5) Petitioner received an above satisfactory annual evaluation in November 1995, (6) Petitioner received a pay raise, (7) Petitioner received eight hours of training, (8) Petitioner admitted that she had no problems

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[3] At MDPD in a district station such as the Intracoastal District station, an officer's supervisor is a Sergeant ("Sgt.") and then the next person up the chain of command is a Lieutenant ("Lt.").

[4] After every month, police officers at MDPD prepare a "daily/monthly officers activity report" (hereafter "monthly report") where they list each of the activities completed on every day of the month such as felony arrests, number of cases, number of moving violations, etc. After the officers fill out the report, it is given to the supervisor, who reviews it, gives the officer ratings and then returns it to the officer. On the bottom of the monthly activity report, the supervisor gives the officer ratings from 1-9 in 27 different categories. Petitioner's references to monthly evaluations or scores refer to these monthly reports.

with her first two supervisors, Sgt. Amabile and then Sgt. Flaherty and that they treated her fine, (9) Petitioner admitted that her first Lieutenant for the first four months at Intracoastal, Cliff Nelson, treated her fine and did not discriminate or retaliate against her, and (10) Petitioner did not suffer any discipline for any reason.

1996

In February 1996, Petitioner bid for the day shift and began reporting to Sgt. Marlene Campbell and the Lieutenant in the chain of command became Lt. Tim O'Connell. Petitioner states that when she first started working for Sgt. Campbell she did not have any problems with her and that other than adjusting her score on her February 1996 *monthly* evaluation, there was nothing else that Sgt. Campbell did that Petitioner did not agree with. Petitioner concedes that she did not complain about her monthly evaluation scores being lower because she was a woman. Petitioner stated that Sgt. Campbell never said anything sexist or discriminatory. From July 1-5, 1996 (with July 4th off), MDPD permitted Petitioner to teach swimming in lieu of her usual duty of working the road. Petitioner was supervised by Sgt. Campbell through August 1996. After Sgt. Campbell, Petitioner's next supervisor was Sgt. Ver Straten. Petitioner stated that she had no problem with Sgt. Ver Straten.

For 1996 Petitioner Receives A Pay Raise and A Satisfactory Evaluation

On November 2, 1996, MDPD gave Petitioner her annual evaluation in which she was rated satisfactory and granted a pay increase. The evaluation noted that

Petitioner's enforcement statistics were below the platoon average. Petitioner conceded that the satisfactory annual evaluation in 1996 did not *damage her in any way*. If the annual satisfactory evaluation in 1996 did not damage her in any way, then the alleged lowering of a category from one monthly evaluation in February 1996 that nevertheless resulted in a satisfactory annual evaluation could not have damaged her employment status and could not be an adverse employment action.

Officer Dubocq Initiates Investigation Into Petitioner's False Arrest of A Subject

On or about December 21, 1996, a Professional Compliance Bureau investigation was initiated by Officer Dubocq against Petitioner in which Dubocq alleged that Petitioner had falsely arrested a subject and then falsified the arrest report. Petitioner did not believe that Officer Dubocq's initiation of the complaint "had anything to do with gender bias" and it appeared that it was a personal issue between them because Petitioner stated that "I do believe it was a problem Officer Dubocq had with me."

In summary, the year 1996 comes to a close, more than 17 months after Petitioner's internal complaint of discrimination at another police station (Northside), and Petitioner was welcomed to her squad, received two raises, an above satisfactory annual performance evaluation in 1995, a satisfactory annual performance evaluation in 1996, and had two separate weeks teaching swimming at the pool.

1997

Petitioner's New Supervisor Is Sgt. Bibi Alonso With Whom Petitioner Has No Problem

Petitioner's supervisor commencing in January 1997 was Sgt. Bibi Alonso. Sgt. Alonso supervised Petitioner until April 1997 and Petitioner stated that she had no problems and no discrimination with Sgt. Alonso. During February 1997, Petitioner wrote a memorandum to Sgt. Alonso explaining that Petitioner had lost a gun that had been issued to her. Petitioner conceded in her Eleventh Circuit Brief that she was never disciplined for anything having to do with the missing revolver. Also during February 1997, Petitioner was permitted to teach swimming at the Training Bureau instead of patrolling the streets.

June 1997

After the completion of the investigation into Petitioner's false arrest of a subject, a disposition panel was convened to review the investigation. The disposition panel sustained the allegations against Petitioner. On the basis of the investigation and the disposition panel's sustaining of the allegations against her, the Director of MDPD, issued a letter to Petitioner dated June 3, 1997, that imposed a twenty-day suspension, and advised Petitioner of her right to appeal the suspension under the County's civil service procedure for appealing discipline.

An Independent American Arbitration Association Hearing Examiner Found That Respondent Was Justified In Suspending Petitioner

Petitioner appealed the suspension pursuant to the County's civil service procedure provided by 2-47 of the

County Code. The Pretrial Stipulation stipulated to the following facts. A neutral Hearing Examiner, appointed through the American Arbitration Association, presided over a hearing on Petitioner's suspension. At the hearing, Petitioner was represented by counsel and was able to present evidence and witnesses.

The Hearing Examiner found that Petitioner had engaged in conduct unbecoming an officer in violation of MDPD rules and sustained the suspension. The Hearing Examiner recommended, however, that the suspension be reduced from twenty days to five days. The County Manager concurred with the Hearing Examiner's report and recommendation and took final action in which he upheld the suspension but reduced the suspension to five days and ordered that Petitioner be reimbursed for fifteen days of pay, which was done by MDPD.

Petitioner testified that the Hearing Examiner that upheld her suspension does not work for the County. Petitioner also testified that the Hearing Examiner did not discriminate against her as a woman and that the Hearing Examiner did not retaliate against her.[5]

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[5] The fact that an independent Hearing Examiner heard the testimony regarding the conduct at issue in the suspension and made a determination that the Petitioner had violated MDPD rules and that the suspension was justified breaks any potential chain of causation between any alleged retaliation and the County Manager's decision to suspend the Petitioner. *See Stimpson v. City of Tuscaloosa*, 186 F.3d 1328 (11th Cir. 1999). The decision also proves that the County had a legitimate non-retaliatory reason for suspending the Petitioner which defeats her claim.

Petitioner testified that the five-day suspension does not affect her ability to be promoted to sergeant. Petitioner did not have to pay fees to the PBA attorney that represented her at the hearing on the suspension. Petitioner admitted that she has not lost any pay other than the five-day suspension.

June 30, 1997 – Petitioner Files EEOC Charge Because of Suspension

On June 30, 1997, Petitioner filed a charge of sex discrimination and retaliation with the Equal Employment Opportunity Commission ("EEOC"). Petitioner testified that the "catalyst" for filing the charge of discrimination with the EEOC was the suspension. The EEOC Charge alleges that the retaliation Petitioner allegedly suffered was the result of her 1995 internal complaint of discrimination and cites no other protected activity as a basis for retaliation.

Petitioner Has No Problems With Supervisor Sgt. Estis And Receives An Above Satisfactory Evaluation and Pay Raise In 1997

Petitioner was also supervised during 1997 by Sgt. Pete Estis. Petitioner stated she got along with Sgt. Estis, had no problems with him, and Sgt. Estis never said anything sexist and never did anything discriminatory.

On December 17, 1997, Petitioner was presented with an annual evaluation in which she was rated above satisfactory. Petitioner did not disagree with the overall rating. On December 17, 1997, MDPD also granted Petitioner a pay increase.

1998

The year 1998 begins, almost two and one-half years after Petitioner's July 1995 internal complaint of discrimination and Petitioner has received three raises, spent three weeks teaching at the pool, and received three annual evaluations, two which were above satisfactory and one satisfactory.

In 1998, Petitioner was supervised for one shift by Sgt. Buchman. Petitioner was asked twice and she testified that Sgt. Buchman had never said anything to Petitioner about being a woman and she also testified that Buchman never said anything sexist to her. Petitioner took issue with Sgt. Buchman over the handling of a call involving a robbery suspect, but acknowledged that she was not issued discipline over the issue.

Petitioner's next supervisor, beginning in May 1998 for two shifts (approximately 8 months), was Sgt. Sharon Soderman. Petitioner had no problems and no discrimination from Sgt. Soderman. Petitioner's Lieutenant during this period was Lt. Diers. Petitioner did not believe that Lt. Diers discriminated against her. Petitioner testified that Lt. Diers never said anything to her about being a woman and that Lt. Diers never said anything sexist to her. During this period in 1998, the Captain at Intracoastal was Captain Heller. Petitioner testified that she did not feel she was treated more harshly under Captain Heller.

December 1998 – Once Again Petitioner Receives A Raise and An Above Satisfactory Annual Performance Evaluation

On December 14, 1998, MDPD granted Petitioner an increase in pay. Petitioner also received an annual evaluation in December 1998 with a rating of above satisfactory from Sgt. Soderman and Lt. Diers.

1999

Petitioner believes that she had a meeting with Major McGee [Commander of Intracoastal] on or about January 5, 1999. Petitioner has had no problems with Major McGee and does not feel that Major McGee has discriminated or retaliated against her and has not suffered any problems thereafter with Lt. Diers. Petitioner's next supervisor was Sgt. Lombardi. Petitioner testified that she has not suffered discrimination or retaliation under Sgt. Lombardi. On August 23, 1999, Petitioner's new supervisor became Sgt. Fisten. Petitioner testified that she has suffered no discrimination or retaliation under Sgt. Michael Fisten. The summary judgment record closed in approximately October 1999.

Petitioner Received 220 Hours of Training While At Intracoastal

Since the time Petitioner lodged her discrimination complaint in July 1995, MDPD provided Petitioner with a significant amount of training totaling 220 hours.

REASONS FOR DENYING THE WRIT

The Supreme Court rules require a compelling reason to grant a writ of certiorari. Sup. Ct. R. 10. There are no compelling reasons in this case given the myriad of deficiencies in the record and the Petition's failure to demonstrate any circuit split that would make any difference in the outcome of this case on this record. Accordingly, the writ of certiorari should be denied.

I. THERE IS NO COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT WHERE THE RECORD UNDERMINES THE ALLEGATIONS UPON WHICH REVIEW IS BEING SOUGHT

The writ should be denied because much of the factual basis for the Petition is refuted by the record and because much of the conduct alleged is outside the scope of the EEOC Charge, the operative Complaint, and the statute of limitations. As a result, Petitioner is seeking an advisory opinion about hypothetical facts not fairly presented by the record in this case.

A. CLARIFICATION OF THE RECORD

The writ should be denied because Petitioner's statement of facts did not fairly present the record in this case, thereby asking the Court to accept certiorari based on assertions of fact that are incorrect or incomplete. As a result, Respondent was required to provide the restatement of the facts above. Some of Petitioner's assertions are so incorrect or incomplete, however, that it is necessary to provide this detailed clarification of the record.

The Petition (p. 3) claims that Petitioner's life was made extremely difficult after she complained about sexual harassment in July 1995. The objective facts in the record completely undermine this bald hyperbole made by Petitioner's counsel. First, the Petition states, apparently as an example of retaliation, that Petitioner was transferred to Intracoastal two months after her internal complaint of sexual harassment in 1995. This appears to have referenced the internal complaint to give the impression that the transfer was somehow adverse. It was not. Petitioner asked to be transferred to Intracoastal and MDPD granted the Petitioner's request.

Welcome to the Squad

Instead of having made her life difficult, the record facts show that from July 1995 when she complained through December 1995: (1) Petitioner's request to transfer to the Intracoastal District station was granted, (2) she was permitted to teach swimming at the pool for one week in September 1995, (3) her first supervisor, Sgt. Amabile, wrote "Welcome to the squad" on her first evaluation, (4) she conceded that her first two supervisors (Amabile and Flaherty) and Lieutenant Nelson treated her fine, (5) she received a commendation in October 1995,[6] (6) she received an *above* satisfactory on her annual evaluation in October 1995, and (7) she received a pay raise near the

[6] Another example of a claim in the Petition unsupported by any specific facts in the record is the parentheses claiming that the "decorations" Petitioner received slowed considerably after she filed a harassment complaint. As set forth here, Petitioner received a commendation on her second month at Intracoastal.

end of 1995. In addition, for the next three years, she received either a satisfactory or an above satisfactory evaluation and pay raises every year.

1996 - Sgt. Campbell and Lt. O'Connell

Beginning February 1996, Petitioner reported to Sgt. Marlene Campbell and the Lieutenant in the chain of command became Lt. O'Connell. Petitioner stated that when she first started working for Sgt. Campbell she did not have any problems with her. Petitioner also testified that other than adjusting her score on Petitioner's February 1996 *monthly* evaluation, there was nothing else that Sgt. Campbell did that Petitioner did not agree with.

The Petition (p. 5) claims that Lt. O'Connell improperly lowered scores on an evaluation. The Petition states no basis in fact to support the claim that it was improper and provides no specifics on what was changed in the monthly evaluation. When Petitioner was asked about Lt. O'Connell, she stated that she believed some scores on her February 1996 monthly evaluation were changed to satisfactory and other scores in that evaluation to below satisfactory. Petitioner did not say which categories were below satisfactory and was not specific on how many were changed to below satisfactory. The record shows that on the February 1996 monthly evaluation only one out of the 27 categories was a "4" rating indicating "needs improvement" (which could have been mistakenly referred to as below satisfactory). Petitioner conceded that she did not complain about her monthly evaluation scores being lower

because she was a woman.[7] And Petitioner offered nothing in the record to show that the 4 rating on one category out of 27 was improper.[8] Moreover, regardless of what score Petitioner was given on the February 1996 monthly evaluation, it was immaterial because her overall annual evaluation for the year 1996 was satisfactory. Petitioner received a raise, and she testified that the annual satisfactory rating in 1996 did not damage her in *any way*.

Transfers and Training

The Petition (p. 8) claims that Petitioner made requests to transfer to the Canine Unit and the Property and Evidence Bureau that were denied. (Pet. p. 8). Aside from providing no dates as to when such requests were made, Petitioner's own testimony refutes that she was denied these transfers. Petitioner testified that she was not aware that she has been denied a transfer to these units and in fact she testified that she had been placed on a list of qualified applicants for the Canine Unit and the Property and Evidence Bureau. This was acknowledged by the Eleventh Circuit yet the misstatement appeared in the Petition anyway. (App. to Pet. at p. 5a n.2).

The misstatement appeared again in the Petition (p. 7) where it asserts that Petitioner's five-day suspension

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[7] The Petition (p. 6) claims that Lt. O'Connell told Petitioner not to complain of discrimination again. That was not her testimony and it is undermined by her statement that she did not complain about the scores on the basis of gender bias.

[8] Petitioner admitted that she had no knowledge of why the score on the monthly evaluation was allegedly lowered.

has "negatively affect [sic] her ability to transfer to a specialized unit (which is a desirable assignment, involving higher pay and possible advancement)." Aside from not providing specifics, this assertion is speculation[9] and is refuted by Petitioner's testimony where she admits that she had been placed on the list of qualified applicants for not one, but two, specialized units, the Canine Unit and the Property and Evidence Bureau. In addition, the Petitioner failed to supply any facts in the record that any possible transfer to these two units had any relationship to her 1995 internal complaint of discrimination. Finally, the parentheses about "possible" advancement is misleading and refuted by Petitioner's testimony where she admitted that the suspension did *not* affect her ability to be promoted to Sergeant, the next rank.

The Petition (p. 8) also claims that Petitioner was told that she was denied a transfer to the Doral district because of her complaint of discrimination. This is a distortion of Petitioner's testimony and ignores the inadmissible double hearsay involved which is not competent summary judgment evidence. Petitioner testified that she did not "remember any specifics" to support her claim that the denial was because of her complaint of discrimination.

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[9] Petitioner admitted in testimony that the rate of pay for these specialized units is the same although she "think[s]" that either Canine or some other unit receives hazard pay but she does not even know what it is. Indeed, if Petitioner had been transferred to a unit with hazardous duty pay, she probably would be claiming that it was adverse because the job was more hazardous, thereby making it less desirable not more desirable. Petitioner also has not provided any facts in the record as to whether there were any vacancies in these units, whether anyone else was accepted, and what their relative qualifications were.

Petitioner then stated that she could *not* say that the reason mentioned by Vance for Lt. Cooper's involvement in the Doral transfer request had to do with Petitioner's 1995 Northside sexual harassment complaint. Thus, that allegation in the Petition is also refuted by Petitioner's testimony.

In addition, in the record before the district court, Petitioner offered no facts to establish that a transfer to Doral would be anything more than a "purely lateral transfer" that courts have held cannot be an adverse employment action. (App. to Pet. at 15a n.3).

Lumped in with the incorrect allegations of being denied transfers to the Canine Unit and the Property/Evidence Bureau, the Petition (p. 8) makes an unspecified claim that the Petitioner was denied training. Aside from the lack of specifics, the Petition failed to acknowledge that Petitioner received over 200 hours of training since her 1995 internal complaint of discrimination and in the record below Petitioner provided no specific facts to make a relevant comparison to similarly-situated officers. (App. to Pet. at 21a).

The Petition (p. 5) claimed that Petitioner demanded formal action when another officer battered her. The Petition fails to acknowledge that the officer against whom she demanded formal action, Officer Dubocq, was given a record of counseling after she filed a complaint against him. The Petition also neglects to mention that the so-called battering was an allegation by Petitioner that Dubocq opened his car door and the car door hit her but caused no injury.

Roll Call

The Petition (p. 8) asserts that Lt. Carrell singled out Petitioner by showing up at roll call when Petitioner was there "so he could disparage her." This claim was supported below by the testimony of a fellow officer named Williams who based his assertion of Petitioner being singled out by stating that it "appeared" to him that Lt. Carrel appears at roll call when Petitioner is present and does not appear at roll call when she is not present. There was no specific testimony offered as to the alleged disparagement and Officer Williams admitted, what should be patently obvious to anyone, that there was nothing wrong with Lt. Carrel being at roll call.

Radar Duty

The Petition (p. 6) claims that Petitioner was singled out for radar duty, "an undesirable job assignment." The Petition offered no facts as to when that occurred and offered no facts to support Petitioner's belief that she had been singled out for radar duty. Petitioner was asked when this occurred and what facts she had to support her belief that she was singled out for radar duty and she testified: "as for facts, I don't have any facts. . . . " She supplied no specific objective facts about the relative amount of radar duty of other similarly-situated officers and admitted that she thought others did it *voluntarily* on their own to get statistics. If Petitioner believed others chose to perform radar assignments *voluntarily*, then it certainly cannot objectively be considered an undesirable assignment. Incidentally, the record reflects that Petitioner received 40 hours of radar certification training in March 1997. If she had been assigned radar it would make sense so that the

officer could make use of the training and learn in the field.

Teaching Swimming

The Petition (p. 6) alleges that Lt. Carrell denied Petitioner's request to conduct swim training. The Petition calls this swim "training" which is misleading since it is not Petitioner who is receiving training for her work as a road patrol officer, instead she is training others by teaching swimming, thereby providing service to the MDPD Training Bureau. The Petition fails to identify when between September 1995 and January 1999, these requests were allegedly denied. The Petition also fails to acknowledge that Petitioner was allowed to spend a week at the pool teaching swimming on three occasions after the internal complaint of discrimination in July 1995.

Missing Weapons Report

Petitioner's supervisor commencing in January 1997, was Sgt. Bibi Alonso. Sgt. Alonso supervised Petitioner until April 1997 and Petitioner stated that she had no problems and no discrimination with Sgt. Alonso. The Petition (p. 6) relies on rank speculation to assert that Lt. Carrell engaged in a contrivance related to a missing weapons report during this period. The record shows that what really happened is that during February 1997, Petitioner advised Sgt. Alonso in a memorandum that she lost a gun that had been issued to her. Lt. Carrell suggested that the report be changed to stolen, which would arguably make Petitioner seem less culpable. In any event, the Petitioner's brief before the Eleventh Circuit conceded that Petitioner "was never disciplined for

anything having to do with the missing revolver." Imagine that, Petitioner loses her service revolver and she receives no discipline. That she would not be disciplined for such an obvious breach of conduct completely undermines Petitioner's claim of retaliation.

The Petition (p. 6) in the next sentence after the missing revolver issue then alleges that "during this time" she received improperly lowered evaluation scores. Despite the glaring lack of specifics, this allegation is undermined by Petitioner's testimony because she stated that when she was supervised by Sgt. Alonso (under whom the missing revolver incident occurred), she had no problems and no discrimination with Sgt. Alonso. So what evaluation is the Petition referring to here? The allegation is also undermined by the stipulated fact that every year Petitioner received either a satisfactory or above satisfactory annual evaluation and a pay raise.

Buchman (early 1998)[10]

The Petition (p. 8) claims that Buchman interfered with a call Petitioner was handling and issued her written discipline. Petitioner was asked about this issue and she admitted that she did *not* receive discipline about this incident.

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[10] As set forth in the Restatement of Facts, Petitioner only worked with Sgt. Buchman for about four months in early 1998, almost two and one-half years after the internal complaint of discrimination in July 1995 that was the only protected activity cited in Petitioner's EEOC charge.

The Petition (p. 8) claims that Buchman made a sexist remark. Besides the fact that Petitioner only appealed the retaliation claim and not the gender bias claim, Petitioner testified repeatedly and unequivocally that Buchman never said anything sexist to her.

The Petition (p. 8) claims that Buchman lowered certain scores on her evaluation to below satisfactory. When this claim was made below, the support cited for it referred to Petitioner's testimony about Buchman's January 1998 monthly evaluation of Petitioner that was presented in February 1998. Petitioner could only state that she "*believed*" that "*a* particular category" on the monthly evaluation had been lowered to below satisfactory. One particular category out of 27 categories in a monthly evaluation in January 1998 that Petitioner "believes" was lowered to below satisfactory is not an adverse employment action, especially where at the end of 1998, in her annual performance evaluation that includes all of the months of the year, Petitioner received an above satisfactory annual performance evaluation and a merit increase in pay. Additionally, Petitioner stated that Buchman told her that the score (in *a* particular category) on the monthly evaluation was lowered because she "didn't have the same statistics as the rest of the squad and that's why I deserved it," which is certainly a legitimate non-retaliatory reason that Petitioner has failed to dispute with record facts.

Fitness for Duty (May 1998)

The Petition (p. 8) claims that petitioner was forced to undergo a fitness for duty examination "for no reason other than to disparage her." There is no basis in fact for

this assertion and it is refuted by Petitioner's testimony in which she first claimed that Buchman "never gave her a reason" and then stated that "I don't think I got a straight answer other than it had to do with my sick time." In any event, Petitioner passed the examination and she admitted that she did not lose any pay because of the fitness for duty examination. Petitioner also admitted that Buchman did not tell her that the fitness for duty examination was because she had made a complaint of discrimination, which incidentally had occurred almost three years earlier. As noted by the district court, the record also reflected that Petitioner was not the only officer required to undergo a fitness for duty examination. (App. to Pet. at 20a n.13).

May 1998

In May, 1998, the Petition (p. 9) states that Petitioner was switched to Sgt. Sharon Soderman's squad for two shifts (approximately 8 months), but failed to acknowledge that Petitioner testified that she had no problems and no discrimination from Sgt. Soderman. During this period in 1998, the Captain at Intracoastal was Capt. Heller. Petitioner testified that she did not feel she was treated more harshly under Capt. Heller.

The Petition (at 9) complains about Lt. Diers checking into Petitioner's mileage reimbursement, but fails to acknowledge that Petitioner admitted that her original mileage reimbursement request was honored by the Department and that she did not lose any money as a

result of the mileage reimbursement incident with Lt. Diers.

Conclusory Opinions

With few facts to support her assertions, Petitioner attempts to make much out of the conclusory opinion of Lt. McGillivray to support the retaliation claim at issue in the appeal. Such subjective opinions, which are devoid of any specific facts within the personal knowledge of the witness, are not competent evidence to defeat the summary judgment motion which rests almost entirely on stipulated facts and Petitioner's testimony. *See Hilburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220, 1226 (11th Cir. 1999) ("conclusory allegations without specific supporting facts have no probative value."); *Doe v. DeKalb County School District*, 145 F.3d 1441, 1449 (11th Cir. 1998) (finding subjective opinions insufficient). Such opinions may also be inadmissible not because Rule 701 of the Evidence Rules prohibits it but because the perceptions are not adequately supported and are not helpful to the understanding of the issue. *Cf. Mitroff v. Xomox Corp.*, 797 F.2d 271 (6th Cir. 1986).

For example, the Petition alleges that it was Lt. McGillivray's opinion that he had never heard an officer being suspended for allegedly making a bad arrest. His opinion is immaterial. That he may never have heard of it speaks only of his knowledge or lack thereof. McGillivray admits he was not a witness to any of the events that led up to Petitioner's suspension. The Petition also offered McGillivray's opinion that it was not customary to relate a bad arrest to internal affairs. The Petition failed to acknowledge that McGillivray testified that a bad arrest

"could" be referred to internal affairs, "[I]t would depend on the circumstances." Accordingly, these opinions are immaterial.

B. ALLEGATIONS NOT IN SECOND AMENDED COMPLAINT

Much of the Petition relies on assertions that purport to be adverse employment actions that were never alleged in the Second Amended Complaint and should not form the basis for Petitioner's claim. *See Manniccia v. Brown*, 171 F.3d 1364 (11th Cir. 1999) (courts need not supply allegations to assist a claim). If an action was so important to Petitioner to consider it an adverse employment action, then it should have been alleged in the Second Amended Complaint. Moreover, these alleged actions were not contained in Petitioner's EEOC Charge which frames the scope of a judicial action under Title VII.

The alleged adverse employment actions that Petitioner relies upon in this Petition that were not alleged in the Second Amended Complaint or the EEOC Charge and should not be considered are: (1) Sgt. Buchman allegedly interfered with a call that Petitioner was handling regarding a robbery suspect (Pet. p. 8); (2) Petitioner received "formal discipline" regarding the disagreement with Buchman (during 1998) about the robbery suspect incident (which is not true) (Pet. p. 8); (3) Petitioner had to perform a fitness for duty examination (Pet. p. 8); (4) Petitioner claimed she was not transferred to Doral District and other transfer requests were allegedly denied (Pet. p. 8); (5) Lt. Carrell showing up at roll call (Pet. p. 8); (6) radar duty (Pet. p. 6); and (7) Lt. Diers checked up on Petitioner's mileage reimbursement (Pet. pp. 9-10). Most

telling of all, the 1997 suspension was not specifically alleged in the Second Amended Complaint or the EEOC Charge. As these alleged actions were so unimportant that they were not even alleged in the Second Amended Complaint or the EEOC Charge, they should not be considered as a basis for Petitioner's claim. Accordingly, much of what Petitioner relies upon to request certiorari is not properly before the Court undermining the purpose of certiorari review.

C. ALLEGATIONS THAT ARE TIME-BARRED

As if the aforementioned problems with the factual basis for Petitioner's claims were not enough, the allegations in the Petition prior to September 1996 are time-barred because even if they occurred, they occurred more than 300 days before Petitioner's June 30, 1997, EEOC Charge. This would bar the allegations set forth in the Petition (pp. 4-6) regarding Capt. Linville in late 1995, Lt. O'Connell in February 1996, Major Gentile in May 1996, and Lt. Carrell before September 1996. These could not fairly be considered as adverse employment actions, because if, as Petitioner argues, the actions were significant enough to constitute adverse employment actions, then they were sufficiently important to be the subject of a timely-filed EEOC Charge. Since they were not the subject of a timely-filed EEOC Charge, they cannot be properly before the Court rendering such allegations inappropriate to consider as a basis for seeking certiorari review.

II. CERTIORARI IS NOT WARRANTED BECAUSE THERE IS NO CONFLICT RELEVANT TO THIS CASE ON THIS RECORD

A. THERE IS NO CONFLICT WITH THIS COURT

Petitioner in three places in the Petition claims that the Eleventh Circuit's unpublished per curiam opinion in this case conflicts with a decision of this Court. (Pet. pp. iii, 10, 13) (heading II). The only Supreme Court case the Petition cites to support this purported conflict is *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). In *Robinson,* the Court decided the narrow question of whether a former employee is considered within Title VII's definition of employee for purposes of asserting a retaliation claim under Title VII. The Court rendered no opinion on what was the requisite conduct necessary to constitute an adverse employment action required to support a claim of retaliation and did not indicate that a far less standard than ultimate employment actions are needed to satisfy the adverse employment action element for a retaliation claim. Indeed, these terms were not even mentioned in the Court's opinion. Thus, Petitioner's claim that the Eleventh Circuit's decision here conflicts with the Supreme Court's decision in *Robinson* is meritless.

B. THERE IS NO CONFLICT WITH OTHER ELEVENTH CIRCUIT OPINIONS

Conflicts within a circuit are hardly a compelling basis for demanding that the Supreme Court intercede and grant certiorari. Even if the argument were considered, the conflict within the Eleventh Circuit that

Petitioner asserts is illusory and was refuted by the Eleventh Circuit in its opinion in this case.

First, the Eleventh Circuit denied the Petitioner's request to have this case heard *en banc*, which is the vehicle for resolving conflicting panel decisions within a federal circuit.

Second, a review of the two decisions that Petitioner claims are in conflict, *Wideman v. Wal-Mart Stores*, 141 F.3d 1453 (11th Cir. 1998) and *Gupta v. Board of Regents*, 212 F.3d 571 (11th Cir. 2000), reveals the exact opposite of a conflict. Far from conflict, in *Gupta*, the Eleventh Circuit relied on and quoted the standard for adverse employment action from *Wideman* as follows:

> An adverse employment action is an ultimate employment decision, such as discharge or failure to hire, or other conduct that 'alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee.' *Robinson v. City of Pittsburgh,* 120 F.2d 1286, 1300 (3d Cir. 1997) (citation and internal marks omitted). Conduct that falls short of an ultimate employment decision must meet 'some threshold level of substantiality . . . to be cognizable under the anti-retaliation clause.'

(Quoting from *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998).

Third, despite the fact that *Gupta* quotes *Wideman*, Petitioner argued to the Eleventh Circuit that *Gupta* was

in conflict with *Wideman*.[11] The Eleventh Circuit addressed the claim and explained to the Petitioner that the decisions were not in conflict. (App. to Pet. at 4a & n.1).[12] Accordingly, there is no conflict within the Eleventh Circuit requiring this Court to grant certiorari.

C. THERE IS NO CONFLICT THAT WOULD CHANGE THE RESULT OF THIS CASE

There is no conflict between the Eleventh Circuit's opinion in this case and the other circuits cited in the Petition on the facts in this record.

The Eleventh Circuit in this case relied on *Wideman* and *Gupta*. *Wideman* stated expressly that the Eleventh Circuit joins the majority of circuits that hold that Title VII's protection against retaliatory discrimination extends to adverse employment actions that fall short of ultimate employment decisions. Indeed, this language is quoted in the Petition and is the standard that Petitioner advocates the district court and Eleventh Circuit panel should have used. Of course, as the Eleventh Circuit panel opinion made clear, it did rely on the standard in *Wideman* that an ultimate employment action is not required. Thus, the Eleventh Circuit's opinion in this case is in line with the majority of the circuits that have considered the issue, assuming there is a true split. Arguably, there may not be

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[11] In discussing the actions taken against the employee in *Wideman*, the Petition conveniently leaves out the fact that the employee in *Wideman* was given a one-day suspension.

[12] It is startling that after it was pointed out by the Eleventh Circuit in this case that these two decisions are not in conflict, Petitioner continues to claim that they are in conflict.

a true conflict on the specific facts of each case because the cases have been rapidly evolving depending on the specific factual circumstances faced by the courts and it appears that much of the asserted conflict might be semantic.

Petitioner relies primarily on the Fifth Circuit's decision in *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997) to assert that there is a conflict with the Eleventh Circuit's decision in *Wideman*. Petitioner appears to be using this Petition to seek review of the Fifth Circuit's decision in *Mattern*. This is not an appropriate use of certiorari since it would make no difference in this case.

Petitioner's conflict argument is flawed because a hypothetical circuit split between two other cases neither of which is still at issue do not warrant the Court granting certiorari in this case. First, the Court already denied certiorari in *Mattern*[13] in 1997 and *Gupta*[14] in 2001. Second, there is no conflict between *Mattern* and the Eleventh Circuit's panel decision *in this case* because under either circuit's view (assuming there is much of a practical difference), the Petitioner here would have no valid retaliation claim given that the Petitioner claims that the Fifth Circuit has a more stringent standard. Thus, resolving the purported conflict between the Eleventh Circuit's panel decision here and *Mattern* will not change the

[13] 522 U.S. 932 (1997).

[14] 531 U.S. 1076 (2001).

result of this case. Accordingly, it makes no sense to grant certiorari and use this case to resolve the purported conflict.

CONCLUSION

The Supreme Court rules require a compelling reason to grant a writ of certiorari. Sup. Ct. R. 10. There is no compelling reason in this case given the myriad of deficiencies in the record and the lack of any circuit split that would make any difference in the outcome of this case on this record. Accordingly, the Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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